

MICHIGAN SUPREME COURT

PUBLIC HEARING

September 26, 2007

CHIEF JUSTICE TAYLOR: Good morning. We're here today for a public hearing. Each speaker gets three minutes. First item – 2002-37 – Mr. Bursch. Good morning.

ITEM 1 – 2002-37 – E-Filing Rules

MR. BURSCH: Mr. Chief Justice and may it please the Court. My name is John Bursch, and I'm here this morning on behalf of Courthouse News Service. Thank you for the opportunity to comment on the proposed e-filing rules. Courthouse News enthusiastically supports this Court's move towards e-filing in this state. Our concern is that the proposed rule allows an e-filing system to be based with only a single outside vendor as the electronic filing service provider as opposed to a model where it's either court run or you have multiple outside vendors. Courthouse News is a media company and its sole business is reporting on the filing of new cases as complaints are filed in Michigan's trial courts. And so obviously there's a huge problem for Courthouse News if all of a sudden a private company, and a potential competitor, all of a sudden could gain monopolistic control over all the filings that are made in a single individual court. And their interest is not just in that competitive world, but also a constitutional one. The First Amendment guarantees fair and equal access to the media in a public information. Certainly the media works best when media entities have fair and equal access. And again when you put all the control of civil filings in one outside vendor as opposed to a government entity or multiple vendors, it creates the problem --

CHIEF JUSTICE TAYLOR: Mr. Bursch how is this being handled in Oakland County?

MR. BURSCH: In Oakland County they are going forward with the outside vendor model.

CHIEF JUSTICE TAYLOR: The same one.

MR. BURSCH: The same one. And I'm not sure how they're handling it.

CHIEF JUSTICE TAYLOR: What – Have you talked to them about this issue you raise?

MR. BURSCH: I've not had an opportunity to talk to Oakland County. What I do know is that across the United States only two states have moved forward with a single outside vendor model --

JUSTICE YOUNG: Did your client have difficulty in accessing the records filed in Oakland County?

MR. BURSCH: To date I do not believe that they've had problems, but it's a very early pilot program.

JUSTICE YOUNG: Well, let me you ask you the question. Is this an access or competition issue?

MR. BURSCH: It's both an access and a competition issue, and one --

JUSTICE YOUNG: Why should we be concerned about the competition issue? Access seems an important question.

MR. BURSCH: Access is important too, and I speak from the experience of Courthouse News in other states where pilot programs or full-blown programs have gone ahead with a single outside vendor model. And they have had problems in those states, not only with competition, but also in getting access to the records.

JUSTICE YOUNG: These are public records. They don't cease to be public records because of who provides the service.

MR. BURSCH: We completely agree.

JUSTICE YOUNG: All right. So I'm trying to understand what the access concern you have is and how these rules fail to protect public access.

MR. BURSCH: Right. For example, let's say that you have a single outside vendor and it doesn't give anyone access to complaints for 48 hours after they're filed. In our case, we've been able to walk up to the clerk's desk in the past and the instant that a complaint is filed be able to see it and then report on it. And as you know the news cycle's short, 48 hours goes by and all of a sudden the story is lost either because it's been report somewhere else or the news is no longer good an the complaint has been circulated through other means. And the problem is you don't have any ability to then influence the outside vendor which is completely different than when the court controls its own docket and you can set

up a relationship for example where complaints are sent immediately to a media company.

JUSTICE KELLY: Well, why could you not still know what's being filed by going to the clerk's office?

MR. BURSCH: When you go to the clerk's office there's still the potential that there's going to be a delay between the time that a document is actually filed and when the vendor chooses to make it available for the public to view on a monitor.

JUSTICE KELLY: So – but you couldn't see it at the clerk's office?

MR. BURSCH: Not if it's filed electronically. I think the hope is that we're gonna eliminate paper filing eventually. At least initially there may be both electronic and paper copies but long term --

JUSTICE KELLY: I understand. Is there any reason why the Court if it went with a single outside vendor could not contract with that vendor to make the information available within 24 hours to (inaudible)?

MR. BURSCH: Well, we have suggested in our comment letter that at bare minimum you would want to put protections like that in place to make sure that a single outside vendor is given immediate access and they're not engaging in unfair competition with other media companies who don't have the advantage of collecting all the documents as they come in on their server. But in our view, the best model is one where the court controls it, not only because you can insure your own equal and fair access to documents, but also because of the revenue that it generates.

CHIEF JUSTICE TAYLOR: Isn't that inevitably much more expensive though?

MR. BURSCH: Well, no. What experience has shown is that with the federal courts and those local courts that have adopted their own e-filing systems, it generates a surplus. Without charging the litigants, the parties to the complaints or the litigation - filing fees. You know, for example, when I go to the Western District of Michigan or the Eastern District of Michigan to file a complaint, I file the standard filing fee, but there is no surcharge for an electronic filing which is what ListNet is doing in the Oakland County pilot model. And so by doing that you eliminate the concern of someone like Attorney General Michael Cox who is concerned that the government, the state government, will be impacted – his budget will be impacted by filing fees or groups like the Michigan (inaudible).

CHIEF JUSTICE TAYLOR: Excuse me sir. Is it your position then that when you file electronically there is a charge for doing that, a surcharge, is that right?

MR. BURSCH: No, my understanding is that when you have a company like ListNet in Oakland County that there is a surcharge of \$5.00 to \$10.00 depending on the document -

CHIEF JUSTICE TAYLOR: To do this.

MR. BURSCH: for the filing because that's how they pay for their costs.

JUSTICE YOUNG: And the federal government has simply absorbed the cost of providing the electronic service.

MR. BURSCH: No, in the federal government model because nonparties frequently access these documents, they actually run a surplus of about, I think, \$55 - \$60 million a year (inaudible) the top.

JUSTICE YOUNG: Where does the surplus come from?

MR. BURSCH: Well, for example, like at my law firm. As a service to our clients, we will get on the federal system and daily check to see if complaints have been filed against our clients.

JUSTICE YOUNG: Is there a charge for that?

MR. BURSCH: There's a charge when we pull up the complaint because we're not a litigant. The litigants don't pay a filing fee, and they can see documents as they're filed without paying a fee, at least you know one time, but if I want to go in as a nonlitigant and see a document there is a charge for that. Just like if I went down to the clerk's office now and had to pay a copy charge. And so the government – the federal government gets its excess revenue from those nonlitigant fees that are charged. You know as another example --

JUSTICE YOUNG: But there is a – understand there's a capitalization cost of creating a system --

JUSTICE CORRIGAN: Is it your position that in the federal government it's all in-house – that they have their own IT system – they haven't done any RFPs and contracted with an outside vendor to manage it? Do you know?

MR. BURSCH: I know in the Western District of Michigan because that's where I'm located, that they used the vendor to help get their system up and running, but that the system is actually located in the courthouse and it's administered entirely by the court. It's their proprietary system. It's been modified to do whatever it is the Western District of Michigan likes to do that may be different than other federal district courts.

JUSTICE CORRIGAN: So is your client really objecting to an RFP process where there might be a single source vendor in a sort-of competitive bidding process? Do they object to that?

MR. BURSCH: They don't object to the process at all. All they object to is the result where at the end of the day you have a single nongovernment vendor.

JUSTICE CORRIGAN: Okay. Let me just say one other practical problem which is Michigan has been burdened because it's had as many as 40 different computer systems in our courts so it's attractive to look at the possibility of a single state-wide vendor because of the problems we've had with trying to get connectivity among multiple systems.

MR. BURSCH: Right.

JUSTICE YOUNG: And perhaps your client could go to the legislative leaders and the governor and increase our technology budget.

MR. BURSCH: We would love to see that happen, not only my client, me personally.

JUSTICE YOUNG: Not gonna happen.

MR. BURSCH: It's not gonna happen, but you could set up a system, I would hope, where you can transfer the hardware and the software that you need to put this system in place so that you could pay for it over time. And again, the nonlitigant fees that would be generated from people participating in the system, pulling documents off of it, would pay for the system and then some which has been the experience of the federal courts and also as I mentioned the state and local courts that have adopted it. For example, the California Superior Court, which obviously has a high volume of cases, has generated outside fees – you know the third-party fees, at twice the rate of their actual expense. I believe they incurred about \$4.7 million in capital costs to run the system, and they generate over \$8.6 million in fees from nonlitigants who are paying to access the system. So ultimately it's a win-win for the judiciary if you can actually increase your budget without a legislative appropriation.

CHIEF JUSTICE TAYLOR: Thank you sir, appreciate it.

MR. BURSCH: Thank you. One last thing, we had suggested in our comment letter a working group. If you wanted to have further discussion about this particularly as the Oakland pilot project progresses and I would be happy both as a representative of Courthouse News but also personally in participating in such a working group. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Patrick Clawson.

MR. CLAWSON: Good morning. I welcome the opportunity to speak on the electronic filing rules, and I think it's a big step forward for the state of Michigan to be going in this direction and an excellent step for the administration of justice. A couple of quick concerns though. The rules as proposed are a little bit vague as to the access to the system that might be provided to pro se litigants and also to indigent litigants. That's an issue that I believe the Court needs to be addressing. Obviously, there are many people in our society who don't yet have internet access, who don't have computer access, although those numbers are shrinking over the years, we want to make sure that the poor and the indigent are not excluded from participating in the system.

JUSTICE KELLY: So what would be your recommendation then to remedy that problem?

MR. CLAWSON: Well, frankly, I think that in courthouses across the state, also in publicly supported law libraries and libraries that there ought to be terminals accessible to the general citizenry to be able access filings and to be able to make filings. I think that perhaps the Court might want to consider a rule where there would be a lower cost or no cost at all for indigent persons to be able to file or pro se litigants to be able to file.

JUSTICE YOUNG: You understand this system is in addition to the ability of anybody to file a paper pleading?

MR. CLAWSON: Yes sir, but as we all know as these things are gonna progress we're gonna go to an electronic document environment regardless over the years. I mean that trend is inexorable it's gonna happen.

JUSTICE KELLY: What is the federal system doing now if anything with respect to this matter?

MR. CLAWSON: Well, on the federal Pacer system right now, it's restricted to attorneys filing. Right now pro se litigants still are allowed to file in paper form. However, that presents some problems in some other districts.

JUSTICE KELLY: No provision for indigent attorneys is that right?

MR. CLAWSON: Indigent attorneys? Well, I haven't met many of those in my career, but I'm sure there are some. At any rate --

JUSTICE YOUNG: Well, how do you propose to deal with the -- Obviously, your proposal is to create access.

MR. CLAWSON: Yes.

JUSTICE YOUNG: That costs something. How do you propose that we do that?

MR. CLAWSON: Well, at the present time I know that indigents can file petitions before the courts of Michigan with a fee waiver authorized by the court in some cases. That certainly is --

JUSTICE YOUNG: That's different -- Waiving a fee is different from providing a terminal access right?

MR. CLAWSON: Correct, but --

JUSTICE YOUNG: You can waive a fee, but you don't -- you lose that fee, but you don't have to make a capital expenditure of equipment etc.

MR. CLAWSON: Sir, the reality of a computer cost right now is that you could put a terminal into most of these courthouses for less than \$200.

JUSTICE YOUNG: And where does the \$200 come from?

MR. CLAWSON: Well, that's certainly something -- Right now in Genesee County I'm speaking with our court administrators there about trying to get some kind of a terminal into the courthouse in the district court to permit public access. I've offered to pay the cost. I would think the bar --

JUSTICE YOUNG: Now you don't think that's a rational basis for equipping the courts -- a volunteer payment of computer terminals do you?

MR. CLAWSON: I don't think that it's unreasonable necessarily to take a look at bar associations and the general public to contribute to some of the cost of this. I mean, it certainly is a viable public interest activity on the part of the bar and public interest groups. Some other technical questions regarding the proposal. I have a computer background. I used to be president and CEO of one of the original internet companies that developed on-line systems back in the 90s. What document types will be allowed to be filed on this system? The proposed rule is silent about that. There's a myriad of different formats - PDFs, Microsoft Word, WordPerfect. The federal system uses PDFs. Other systems in other states use a variety of word processing and PDF-type formats. I would think that the Court might want to standardize on one particular format, but that's not expressed in the current rule. Proofs of service on civil process. Now I happen to serve civil process throughout Michigan. I'm always in courts filing returns of service – proofs of service. Under the proposed rule it does not appear that I would have any kind of access to the system to be able to file a proof of service. Does the Court intend to change rules or change procedures so that process servers would have to supply those to the attorneys so the attorneys who would be authorized electronic access could file proofs of service? In some jurisdictions such as Texas, the electronic filing rules there allow proofs of service and subpoenas to be filed in paper form with the courts. As we're proceeding forward, I would think that you might want to consider who is going to have access to the system beyond just attorneys. There are parties that interact with the criminal justice system and the civil justice system, such as process servers, that have to file things in court. Right now in Michigan the burden is actually on the process server to file the return with the court and I do that on almost a daily basis. Service fees associated with this – the rule appears to be somewhat silent on this issue. Should these be considered taxable court costs? Should these be considered normal court costs? I would suggest that the Court might want to consider that because any type of electronic filing surcharge fees should be a taxable court cost. And relating to digital signatures, there's nothing in the proposed rule addressing the use of digital signatures, and especially notaries. In some states they're now adopting rules that would prevent notaries to have access to the filing system and using electronic digital signatures as an authenticator of documents.

JUSTICE YOUNG: Sir, did you submit a written submission?

MR. CLAWSON: No, sir, I did not.

JUSTICE YOUNG: Why don't you do that?

CHIEF JUSTICE TAYLOR: It might be helpful if you did that.

MR. CLAWSON: I would be delighted to do that. If the Court would permit me I'd be happy to do that.

CHIEF JUSTICE TAYLOR: Thank you Mr. Clawson I think you're time is up.

MR. CLAWSON: Thank you very much sir.

CHIEF JUSTICE TAYLOR: Jan Eathorne on Item 2.

ITEM 2 – 2005-20 – MCR 8.110

MS. EATHORNE: Good morning. As a member of the public, you'll be heartened to know that I'm going to applaud the comments made by the Michigan Judges Association in their endorsement of this proposal. I believe that when they wrote it, the appearance of impropriety was the most important issue that they wanted to make the Supreme Court aware of and they felt that this proposal would give their court and members of their court more trustworthiness in the eyes of the public. I, however, would like to tweak that proposal a little bit more. In March when I read the complaint that was filed against Judge Owens in its entirety, I was really quite dismayed. As a registered nurse for over 18 years, most of the time was spent in the intensive care unit, that complaint looked more similar to me like an admission note to a hospital rather than a complaint of misconduct by a judge. I don't think I should have to say this to you, but a person's body can drastically change in a matter of 12 hours. To request a medical verification of a condition for over 120 days just doesn't make sense to me. If Judge Owens would have had the opportunity within 12 days of when she recognized that she wasn't able to function, than perhaps medical intervention would have been much more meaningful to her. But most of all is that she wouldn't have had to go through the embarrassment in the public media scrutiny of her demise.

JUSTICE YOUNG: Is it your belief that you don't – that there's no requirement of documentation of illness before 12 weeks?

MS. EATHORNE: 120 days right.

JUSTICE YOUNG: That's not what this says. The chief judge may request medical documentation at any point.

Ms. EATHORNE: But my – I think the public --

JUSTICE YOUNG: The 12 week period – The 12 week is the trigger for intervention perhaps by SCAO to require an independent medical examination, but the chief judge can request documentation at any point.

MS. EATHORNE: Right, and well they should. I think that what I understood from the Michigan Judges Association as a layperson is that as a member of a group they understood that the appearance of impropriety in the public is always there. And when we know that rules are there that would support their decision making that we feel a greater sense of confidence in the judiciary. I did go through the records and it appears to me that fairly recently eight other judges found themselves in that situation. It's not unreasonable for me to understand that they might not fully understand the exact needs of their condition -
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CHIEF JUSTICE TAYLOR: Can I ask you a question Ma'am? The thrust of your comments I'm having a little trouble grasping. You want to have the ability, if I understand it, for -

MS. EATHORNE: The supervising judges --

CHIEF JUSTICE TAYLOR: to get this information is that right?

MS. EATHORNE: Right, readily, and at your discretion.

CHIEF JUSTICE TAYLOR: Okay. So your concern – your concern is that the way the rule is written a misbehaving judge is going to be able to avoid doing this is that right?

MS. EATHORNE: I think that a delay of more than 120 days does not benefit the judge.

CHIEF JUSTICE TAYLOR: Okay, just answer the question. You think that the problem here is it's too easy for judges to evade giving this information.

MS. EATHORNE: I do.

CHIEF JUSTICE TAYLOR: Okay, I just wanted to make sure.

MS. EATHORNE: Right. And I think that --

JUSTICE YOUNG: I think you're misreading the rule. The first sentence says "any judge or justice must provide medical documentation verifying the need for medical leave if requested by the chief judge or chief justice."

MS. EATHORNE: Right, and I --

JUSTICE YOUNG: It has nothing to do with (inaudible) --

MS. EATHORNE: That's how the amendment is right?

JUSTICE YOUNG: Yeah, that's what we're doing -- We're authorizing the chief judge to demand, and requiring judges to supply, documentation verification of their illness.

MS. EATHORNE: Yes.

JUSTICE YOUNG: The 12 week period, which a number of the members of the public have focused on, has to do with a much more invasive process of demanding that the judge submit to an independent medical examination if they haven't done so prior.

MS. EATHORNE: Right.

JUSTICE YOUNG: So I -- The rule actually enables the production of verification of medical illness from the outset. It's exactly the opposite of what I think you're -- you think this provision means.

MS. EATHORNE: Well, as I understand it the rule has been kind of lax, and this is giving the judges --

CHIEF JUSTICE TAYLOR: But there hasn't been a rule.

MS. EATHORNE: Right, well, I'm being polite.

CHIEF JUSTICE TAYLOR: Okay, well, no, I mean there hasn't been a rule so it can't be lax or severe. But there is now the effort to get a rule --

MS. EATHORNE: Right and I applaud that.

CHIEF JUSTICE TAYLOR: And I think what Justice Young says is correct that what you are focusing on is the independent medical examination provision, not the provision which I think you are concerned about.

MS. EATHORNE: No, I'm not concerned about an independent -- I believe that any, from my experience, I believe that most doctors are going to be rather forthright. I don't find that I've come across very many that are going to be

skirting the issue when asked directly by a supervisor of a judge or any employee. The point is that I think that in the past at least in my records and I have all the information at the clerk's office, I found that there were 8 judges in the recent past that might have physically benefited if they had been more accountable for their extended lengths of illness. And then the last thing that I have to say is that I've been here several times and some of these proposed amendments languish and I would hope that you would speedily address this one because I do think that for the good of everybody that if it was adopted it would benefit the public. And thank you so much for your time.

CHIEF JUSTICE TAYLOR: Thank you very much Ma'am. Item 5 – John C. Von Handorf – Jan – Joan, excuse me, I'm sorry I misread that. I was so focused on getting the harder name right I missed the easier name.

ITEM 5 – 2006-28 – MCR 5.207 etc.

MS. VON HANDORF: That's okay, that's why my mother gave me an easy first name. My name's Joan Von Handorf, I'm with the Probate and Estate Planning Council, and I've come here with regard to administrative file #2006-28 which are some amendments to some probate court rules. I'd like to first – I'd to address two of the court rules. The first one is MCR 5.409(c). This one has to do with filing accounts of a conservator, and as I'm sure you know every year a conservator has to file an account and when they file the account they have to give evidence of incoming disbursements. And this new court rules requires them also to provide – Rather, that the court rule has two alternatives. The first alternative requires us to provide only a verification of funds which is a form which has to be signed by a representative of the (inaudible). And the second alternative allows us to either use the form verification of funds, or to just provide a bank statement for presentation to the court. And we are in favor of the second alternative, alternative B, because it gives us some flexibility. Often getting information from clients is very difficult, and to get this verification of funds if that would be the only way we can show the amounts in the account that would be difficult for us. The other court rule I'd like to talk about is 5.302, commencement of decedent's estate. And that one, under the current court rule, we have to provide a death certificate when we open an estate. And the proposal provides us a procedure for dealing with the situation where the death certificate lists the residence as different than what the court we're trying to file in. By statute we have to determine the domicile of the deceased persons and the courts are currently looking at the death certificate to determine the domicile. And so when we have a domicile alleged in our petition or application which is different than the residence listed on the death certificate there's a problem. And so we are proposing a procedure where there will be a court hearing to determine what the domicile is.

JUSTICE CORRIGAN: Ms. Von Handorf? My question is why it needs to be this complex. Did you read the comments of Register of Probate Patricia Hanson?

MS. VON HANDORF: Yes, I have.

JUSTICE CORRIGAN: Why isn't it just good enough to file an affidavit? If someone you know dies in a car accident in Oakland County and they live in Livingston, why isn't it enough to file an affidavit saying that their real residence – Why does there need to be a court hearing about that?

MS. VON HANDORF: Well, the problem is your honor that the verified application or petition is already – it's the same as an affidavit so I don't see what an affidavit adds to the procedure if we already have a verified application or petition.

JUSTICE CORRIGAN: Well, is this a huge problem?

MS. VON HANDORF: Apparently it is especially in Oakland County because this is the procedure that Oakland County is currently using whenever they have a difference in the death certificate and --

JUSTICE CORRIGAN: But why does it need to be this hard? That's my question. Why does it need to be this hard if it's a verified affidavit why can't we take people at their word unless there's a real dispute that the real domicile is in the county as alleged in the verified petition?

MS. VON HANDORF: Well, if we have the verified petition, I guess my position your honor is either I accept the verified petition or application and I don't see what the affidavit adds to it. And if that would be sufficient without a hearing, than I think that would be fine by the Probate and Estate Planning Council. If we can do that without a hearing, but the affidavit just doesn't make any sense at this point either. So if we are going to eliminate this amendment, then if you would decide to go with this then I do have one other comment. If - The way the court rule is currently listed it says that if the death certificate indicates the domicile is a certain county, death certificates only list residence, and so we would like if you – if that amendment is approved, we would like it to say if the domicile or residence of decedent is determined to be a certain county. We would like to add in that language because the death certificate only says residence.

JUSTICE YOUNG: Did you submit written comments?

MS. VON HANDORF: I'm sorry your honor.

JUSTICE YOUNG: Did you or your organization submit written comments?

MS. VON HANDORF: Yes, we did.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE TAYLOR: Thank you very much Ma'am appreciate it.

MS. VON HANDORF: Thank you your honor.

CHIEF JUSTICE TAYLOR: That completes the speakers for today. We will stand in recess.